They are not complaining of any interference of their rights of way by the plaintiffs or any residents of Grange Heights. That is certainly not their case here.

In the result, the application for discharge of the interim injunction is dismissed with costs. The substantive application in the originating summons is allowed, and I grant to the plaintiffs the injunction asked for and further order that the defendants remove the iron gate across the Grange Road end of the servient tenement and the fence across the Grange Heights end thereof. The plaintiffs will have costs of these proceedings. These costs shall include the costs of hearings when the order was for costs in the cause and further, the costs of the hearing by me of the opposed ex parte application on 28 April 1989 when I ordered that the costs shall be reserved to the judge hearing the originating summons.

There are two outstanding matters. In view of the peculiar circumstances and possible new issues arising out of a management corporation bringing this action, I do not wish, without hearing full arguments from each party, to make an order for assessment of damages.

There were committal proceedings in this case and in the light of the decision which I have reached today, Mr Singam raised the point of which party should bear the costs of those committal proceedings.

In the absence of Mr Yap today, I do not wish now to hear arguments on these two matters as it will be unfair to the advocate representing him. I will therefore hear arguments on these two matters upon Mr Yap's return to work. The parties are to ask the registrar for a date.

Application dismissed.

Solicitors: *Drew & Napier; Donaldson & Burkinshaw.*

Reported by *Kevin Mathews*

Wardley Ltd v Town & City Properties Ltd

HIGH COURT (SINGAPORE) — SUIT NO 13 OF 1989
CHAN SEK KEONG J
19 NOVEMBER 1990

Civil Procedure — Statement of claim — Striking out — Abuse of process — Res judicata — Rules of the Supreme Court 1970, O 14, O 18 & O 21

The plaintiffs were the manager of a syndicate of lenders and by two loan agreements which were later supplemented, the lenders made loans to the borrower, BDP. These loans were guaranteed by the defendants. On 13 November 1987 the plaintiffs commenced an action in Suit No 2931 of 1987 against the defendants as guarantor of the aforesaid sum and interest until payment in full. The defendants entered appearance, and after the statement of claim was amended, the plaintiffs applied for summary judgment. The assistant registrar made an order giving conditional leave to the defendants to defend upon provision of a banker's guarantee. The defendants appealed against the decision which was allowed by Chua J and no further step was taken in the proceedings until 24 December 1988 when the plaintiffs filed a notice of discontinuance.

On 4 January 1989 the plaintiffs commenced the present action claiming against the defendants as guarantor the sum of $17,759,049.63 and interest. After the entry of appearance by the defendants, the plaintiffs applied for summary judgment. A dispute arose at the hearing of the O 14 application as to the ground or grounds of Chua J's decision in the previous suit. Counsel for the plaintiffs contended that the judge allowed the appeal on the sole issue of misjoinder of the parties. Counsel for the defendants contended that there were other triable issues. On 10 January 1990, Chua J certified that his order was not based solely on the issue of misjoinder. Hearing was resumed and counsel for the defendants contended that the application was 'res judicata'. However, the defendants were granted unconditional leave to defend and the appeal by the plaintiffs was also dismissed but no reason was recorded for the decisions.

Following that, the defendants took out the present application to strike out the statement of claim pursuant to O 18 r 19 of the Rules of the Supreme Court 1970. Counsel for the defendants again relied on Chua J's certification and again counsel for the plaintiffs contended that res judicata did not apply. The application was dismissed by the assistant registrar. The defendants now appeal.

Held, dismissing the defendants' appeal:

(1) It is not disputed that the plaintiffs had commenced a new action based on counsel's advice that Chua J's decision rested on the issue of misjoinder and that advice was based on a misapprehension of the correct position. If counsel had not been mistaken on this fact the plaintiffs would have been justified to start a new action as a misjoinder is a procedural defect which the plaintiffs were entitled to cure. As to the allegation of the abuse of process, there was no question of a deliberate attempt to bypass Chua J's decision.

(2) In any case the plaintiffs were entitled under the Rules of the Supreme Court 1970 to discontinue any action for any reason whatsoever without the leave of court if they come within the terms of O 21 r 2 which they did. As such the court could not understand why it was an abuse of process for

the plaintiffs to have begun a new action in respect of the same claim. The question before the court was not whether it was an abuse of process for the plaintiffs to make another application for summary judgment in the fresh action for if that had been the question, the court might have agreed that it may simply amount to an attempt to avoid the legal effect of Chua J's decision.

(3) On the issue of res judicata the submission of the defendants was in substance a submission on issue estoppel, as contrasted with cause of action estoppel which, in the court's view of O 21 r 2, could not possibly apply to a fresh action. Even if there was issue estoppel, it could not transform a decision that there was an arguable defence into one that there was a good and valid defence. The application was misconceived as a result of the confusion.

[*Editorial Note*: The defendants have appealed to the Court of Appeal vide Civil Appeal No 102 of 1990.]

Case referred to

1 *Ansa Teknik (M) Sdn Bhd* v *Cygal Sdn Bhd* [1989] 2 MLJ 423 (distd)

Legislation referred to

Rules of the Supreme Court 1970 O 18 r 19, O 21 r 2(1)

Allan Tan for the plaintiffs.
Manjit Singh for the defendants.

Cur Adv Vult

Chan Sek Keong J: This is an appeal by the defendants against my decision dismissing the defendants' appeal from the decision of the assistant registrar dismissing the defendants' application to strike out the statement of claim of the plaintiffs pursuant to O 18 r 19 of the Rules of the Supreme Court 1970.

The background to this appeal is as follows. The plaintiffs were the manager of a syndicate of lenders comprising themselves, Bank of China, The Kwangtung Provincial Bank and Hong Leong Finance (collectively, 'the lenders') under two loan agreements, one dated 13 October 1982 (as supplemented by four supplemental loan agreements dated 17 January 1983, 22 November 1983, 24 January 1986 and 24 January 1986), and the second dated 22 November 1983 (as supplemented by two supplemental loan agreements both dated 24 January 1986). Pursuant to these loan agreements, the lenders made loans to the borrower, viz Bestland Development Pte Ltd.

The loans made under both the loan agreements were guaranteed by the defendants under a guarantee dated 22 November 1983 executed by the defendants in favour of the lenders. By its terms, the liability of the defendants under the guarantee was limited to not more than (i) 51% or (ii) that percentage of issued shares in the borrower owned by the defendants for the time being, whichever was the higher, of the liabilities of the borrower.

The lenders declared an event of default under the loan agreements on 6 November 1987 and demanded repayment forthwith of $92,726,553.46 being the aggregate amount due and owing thereunder. On 10 November 1987, the lenders made a demand to the defendants for payment of 51% of the principal sum ($47,290,542.26) under the guarantee.

On 13 November 1987, the lenders commenced an action in Suit No 2931 of 1987 against the defendants as guarantors for the aforesaid sum of $47,290,542.26 and interest at the contractual rate until payment in full. The defendants entered appearance, whereupon, after a procedural skirmish between the parties which led to the statement of claim being amended, the plaintiffs applied for summary judgment.

At the hearing, the assistant registrar made an order giving conditional leave to the defendants to defend upon their providing a bankers' guarantee. The defendants appealed. The appeal was heard on 5 July 1988 by Chua J who allowed the appeal and gave the defendants unconditional leave to appeal. After that no further step was taken in the proceedings until 24 December 1988 when the lenders filed a notice of discontinuance of the action pursuant to O 21 of the Rules of the Supreme Court 1970.

On 4 January 1989, the plaintiffs commenced the present action on behalf of the lenders (including themselves) to claim against the defendants as guarantor the sum of $17,759,049.63 and interest thereon until payment. The defendants entered appearance, whereupon the plaintiffs applied for summary judgment. This time, the defendants filed an affidavit claiming that the amount owing by the borrower was $15,408,609.14; that the lenders were aware that the borrower had commenced an action against Japan Airlines Development Corp claiming damages for $30,000,000 for wrongful termination of a contract and had been advised by Queen's Counsel that it had a good claim; and that if the agents of the lenders, viz receivers and managers of the defendants appointed by the lenders, had been diligent in prosecuting the borrower's claim for damages, they would have recovered more than enough to meet the liability of the defendants under the guarantee. The defendants filed a further affidavit on 11 May 1989 alleging breach of duty on the part of the plaintiffs to them as guarantors in releasing another guarantor from its liability for the indebtedness of the borrower to the lenders.

At the first hearing of the O 14 application before the assistant registrar on 28 September 1989, a dispute arose as to the ground or grounds of Chua J's decision. Counsel for the plaintiffs contended that Chua J allowed the appeal on the sole issue of misjoinder of the parties entitled to sue under the loan agreements.

Counsel for the defendants contended that there were other triable issues. The hearing was then adjourned to enable the parties to ascertain from Chua J the basis of his order. On 10 January 1990, Chua J certified that his order was not based solely on the issue of misjoinder.

Hearing was resumed on 2 March 1990. Counsel for the defendants contended that the application was 'res judicata' on the basis of Chua J's certification. Counsel for the plaintiffs contended it was not as the issue of liability had not been finally decided by the court. The assistant registrar granted the defendants unconditional leave to defend. On 6 March 1990, the plaintiffs appealed. The appeal was heard by the Judicial Commissioner, Mr Tan Teow Yeow, on 21 August 1990. Counsel for the defendants again put forward the argument of 'res judicata' and further contended that the O 14 application was a deliberate attempt to bypass the decision of Chua J in Suit No 2931 of 1987. The appeal was dismissed. Neither the assistant registrar nor the Judicial Commissioner has recorded any reason for his decision.

Following the assistant registrar's dismissal of the O 14 application on 2 March 1990, the defendants, on 14 April 1990, took out an application under O 18 r 19 of the Rules of the Supreme Court 1970 and 'such other rule or law as may be relied on' that:

1 The writ of summons indorsed with the statement of claim against the ... defendants be struck out as:

(a) it discloses no reasonable cause of action ...,
(b) it is scandalous, frivolous and vexatious,
(c) it may prejudice, embarrass or delay the fair trial of the action,
(d) it is otherwise an abuse of the process of the court.

2 In the meantime, all further proceedings in this action be stayed; ...

The hearing of this application came before the assistant registrar on 21 May 1990. Counsel for the defendants again relied on Chua J's certification, and again counsel for the plaintiffs contended that res judicata did not apply. The assistant registrar also dismissed this application, again without giving any reason.

The defendants appealed against the said decision and the appeal came on for hearing before me on 9 October 1990 when I dismissed the appeal on the ground that the application was misconceived. The defendants have appealed to the Court of Appeal, as a result of which I am obliged to give my reasons in writing.

Before me, counsel for the defendants argued his case on only one ground, ie the present action was an abuse of process of court because it was a deliberate attempt to bypass Chua J's decision giving unconditional leave to the defendants to defend the same chain. Counsel relied on *Ansa Teknik (M) Sdn Bhd* v *Cygal Sdn Bhd*,[1] a decision of LC Vohrah J. Counsel also commented that the plaintiffs should not have discontinued their first action, and in doing so without leave of the court, had put themselves in a predicament of their own doing.

The Malaysian decision cited by counsel was made in a winding-up petition filed by the petitioners against the respondents to wind up the respondents on the ground of insolvency arising from the respondents' failure to meet a statutory notice of demand dated 30 December 1987 for $154,449.59 and interest thereon. Prior to the service of the notice, the petitioners had commenced an action in the High Court to recover the said sum from the respondents. The respondents were given unconditional leave to defend the claim in O 14 proceedings. The petitioners then discontinued the action without the leave of court contrary to O 21 r 2(1) of the 1980 Rules, and then served the said statutory notice on the respondents, followed by the filing of the winding-up petition. The respondents took out an application to strike out the winding-up petition on the ground that it was an abuse of process as there was a bona fide dispute on the debt on which the petition was based. The learned judge agreed with that argument and struck out the petition.

Ansa Teknik's case[1] was clearly a case of abuse of process. The petitioners abused the process of winding-up proceedings by using it as an alternative means of recovering a disputed debt.

In the action before me, I was unable to see what the nature of the abuse of process was or where it lay. It was not disputed that the plaintiffs had commenced a new action on counsel's advice that Chua J's decision was on the issue of misjoinder, and that advice was based on a misapprehension of the correct position. If counsel had not been mistaken on this fact, the plaintiffs would have been justified to start a new action, as misjoinder is a procedural defect which the plaintiffs were entitled to cure. There was no question of a deliberate attempt to bypass Chua J's decision.

In any case, the plaintiffs and the other lenders were also entitled under the Rules of the Supreme Court 1970 to discontinue any action for any reason whatever, without the leave of the court, if they came within the terms of O 21 r 2(2), which they did. In view of the express terms of r 4 of the same order (which provides that 'the fact that a party has discontinued an action ... or withdrawn a particular claim made by him therein shall not be a defence to a subsequent action for the same, or substantially the same, cause of action'), I could not understand why it was an abuse of process for the plaintiffs to have begun a new action in respect of the same claim. The question before me was not whether it was an abuse of process for the plaintiffs to make another application for summary judgment in the fresh

action. If that had been the question, I might have agreed with it, not on the ground of a deliberate attempt to avoid the legal effect of Chua J's, but that it simply amounted to an attempt to do so.

On the issue of res judicata, the submission of counsel for the defendants was unfocused, but it could only have been that the issue whether or not the defendants were entitled to unconditional leave to defend had been decided by Chua J and that the plaintiffs were bound by this decision. This was, in substance, a submission on issue estoppel, as contrasted with cause of action estoppel which, in view of O 21 r 2(2), could not possibly apply to the fresh action. I thought that there might be some substance in this submission if confined to the issue that the plaintiffs were bound by Chua J's decision, but I did not think that it was necessary for me to rest my decision on this basis.

The reason was that even if I had assumed that there was issue estoppel, it could not transform a decision that there was an arguable defence into one that there was a good and valid defence. The application was misconceived as a result of this confusion.

Appeal dismissed.

Solicitors: *Godwin & Co; Manjit Darshan & Partners.*

Reported by *Yap Shao Sin*

Sri Jaya Sdn Bhd v Chip Hua Contractors Pte Ltd

HIGH COURT (SINGAPORE) — SUIT NO 1822 OF 1978
RAJAH J
28 SEPTEMBER 1990

Land Law — Agreement for sale and purchase of land — Purchaser and sub-purchasers defaulted — Whether purchaser liable for payments stipulated under the agreement — Remedies of the vendors

Contract — Agreement for sale and purchase of land — Construction of terms

The plaintiffs were the registered owners of land comprising 32 units of flats ('the property'), and the property was mortgaged ('the mortgage') to a bank. The plaintiffs and the defendants entered into an agreement ('the agreement') for the sale of the property from the plaintiffs to the defendants. Under the terms of the agreement, the defendants were to be responsible for (i) certain payments of interests due under the mortgage and (ii) payment of service charges to the plaintiffs for the flats comprised in the property.

The defendants sold various units in the property to 20 sub-purchasers. The sub-purchasers entered into tripartite agreements with the defendants and the plaintiffs. Eighteen of the 20 sub-purchasers failed to make payment of the full purchase price of their purchase of the respective units.

The defendants failed to pay the plaintiffs the full purchase price of the property, the interest payments on the mortgage and the service charges.

[*Editorial Note*: The defendants have appealed to the Court of Appeal vide Civil Appeal No 91 of 1990.]

Held, allowing the plaintiffs' claim:

(1) The defendants had breached the express terms of the agreement regarding payment of interest on the mortgage and the service charges on the flats. The plaintiffs' claim be allowed with interest at 8%.

(2) As regards the 12 units not sold by the defendants, the defendants not having carried out their part of the bargain, an order be made that the plaintiffs be given possession of the unsold units forthwith.

(3) As regards the 20 units already sold and occupied, damages for wrongful continued possession of the 20 units was ordered against the defendants. Damages was to be assessed by the registrar.

SH Almenoar for the plaintiffs.
Denis Tan (*Jeffrey Ching* with him) for the defendants.

Cur Adv Vult

Rajah J: The plaintiffs are registered owners of the land known as lot 2990 of mukim XXIV together with a block comprising 32 units of flats (Block A) erected thereon (hereafter referred to as 'the premises'). The premises were and are mortgaged to the United Malayan Banking Corp Bhd.

The plaintiffs and defendants entered into an agreement dated 11 June 1975. By this agreement the plaintiffs agreed to sell and the defendants agreed to buy the said flats for $28,500 per flat thus totalling $912,000 for the 32 flats. The sale and purchase was upon the terms and conditions as set out in the said agreement.

Clause 3 of the said agreement provides as follows:

> The lessee hereby agrees with the lessor that the lessee will be responsible for payment of all interest calculated on the said sum of $912,000 which shall become due under the mortgage as from the date hereof. All interest due but not paid before shall be for the account of the lessor. If the lessee shall make default to pay the interest aforesaid for one month at the percentage of the mortgage calculated on the purchase price of $912,000 then the lessor will be entitled to treat this agreement as having been repudiated by the lessee and to forfeit the deposit and all other payments made by the lessee.

Clause 4 of the said agreement provides as follows:

> After payment of the ten percent (10%) deposit by the lessee to the lessor, the lessee is liable to pay interest as charged by the mortgagees for a period of one year and if the lessee shall make default in payment of interest under the mortgage for a period of three consecutive months the lessor shall be entitled to treat this agreement as having been repudiated by the lessee and to forfeit the deposit and all other payments made by the lessee. However if the lessee shall settle the full amount of $912,000 earlier than